UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RICHARD L. BABIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-28-B***
	)	
KENNETH S. APFEL, Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

The defendant, the Commissioner of Social Security, seeks dismissal of this action for review of his decision to dismiss the plaintiff's request for a hearing on this claim for benefits under Title II of the Social Security Act. The commissioner contends that this court lacks jurisdiction over this appeal because the plaintiff failed to exhaust his administrative remedies, citing 42 U.S.C. § 405(g). The plaintiff contends that his mental incapacity at the time he failed to appeal the adverse decision on his claim for benefits issued by an administrative law judge exempts him from what would otherwise be a procedural default. I recommend that the court grant the motion.

I. Background

On April 26, 1996 the plaintiff filed an application for disability insurance benefits under the Social Security Act, alleging an inability to work due to Crohn's disease, beginning on November 15, 1994. Decision [of Administrative Law Judge], part of Exh. 1 to Declaration of William R.

Waxman, etc. ("Waxman Dec.") (Docket No. 4), at 1. After administrative denials of the claim, the plaintiff requested a hearing, which was held on March 25, 1997. *Id*. The plaintiff was represented at the hearing by a paralegal. *Id*.

The administrative law judge found, in an opinion dated June 27, 1997, that the plaintiff suffered from the severe impairments of Crohn's disease and a substance addiction disorder (in remission), but that he retained the residual functional capacity for sedentary work and was not disabled as that term is defined in the Social Security Act. *Id*. at 8-9. A notice of decision dated June 27, 1997 and mailed to the plaintiff with the administrative law judge's opinion informed the plaintiff, *inter alia*, that if he wished to appeal the decision to the Appeals Council of the Social Security Administration he must do so within 60 days and included instructions for perfecting such an appeal. Notice of Decision, part of Exh. 1 to Waxman Dec., at 1-2.

On or about February 19, 1998 the attorney who represents the plaintiff in this proceeding filed with the Social Security Administration's Office of Hearings and Appeals an appointment of counsel form, a contingent fee agreement, and a request for review of the administrative law judge's opinion. Letter dated February 19, 1998 from Francis M. Jackson to Suzanne Russell, Exh. 2 to Waxman Dec. Invoking Social Security Ruling 91-5p, the attorney asked that good cause be found for the plaintiff's failure to file a timely appeal due to his "lack of understanding of the process and his depression." *Id*. Included in exhibits filed at the hearing before the administrative law judge were copies of the records of plaintiff's treatment by a physician showing that medication for "[s]ymptoms suggestive of depression" was prescribed on April 17, 1996. Exh. 3 to Waxman Dec., also marked as Exhibit 6F (see Transcript, included in Exh. 3 to Waxman Dec., at [1]), at [4]. The next entry in the medical record, dated May 17, 1996, reports "[n]o symptoms suggestive of

depression at this time." *Id*. There is no other medical evidence of depression in the record.

By letter dated December 3, 1998 the Appeals Council denied the request for review on the basis that the plaintiff had been represented at the time of the administrative law judge's decision. Order of Appeals Council, Exh. 4 to Waxman Dec., at 1-2. The plaintiff then submitted an affidavit to the Appeals Council in which he stated that the paralegal who had represented him before the administrative law judge "was not willing to represent me in an appeal to the appeals council," so that "there was no one legally responsible for processing my appeal" during the 60-day appeal period. Affidavit [of Richard Babin] ("Plaintiff's Aff."), attached to letter dated December 14, 1998 from Francis M. Jackson to Gabriel E. DePass, Exh. 5 to Waxman Dec. By letter dated February 8, 1999 the Appeals Council denied the plaintiff's request for further review based on his failure to submit evidence to support his allegations of mental impairment. Letter from Gabriel E. DePass to Francis M. Jackson, Esq. ("DePass Letter"), Exh. 6 to Waxman Dec.

The plaintiff filed a complaint seeking judicial review in this court on February 1, 1999. Docket No. 1.

II. Discussion

Judicial review of the commissioner's decisions is governed by 42 U.S.C. § 405(g), which provides for such review only when the commissioner's decision is a final decision. If an application for benefits is denied by an administrative law judge following a hearing, the applicant must request a review of the decision within 60 days from the date of receipt of notice of the decision. 20 C.F.R. § 404.968(a)(1). The Appeals Council may allow an extension of this time upon written request for good cause. 20 C.F.R. § 404.968(b). In the absence of Appeals Council review, the decision of the

administrative law judge is final and binding. 20 C.F.R. § 404.955. Only after a timely request for Appeals Council review has been made and the Appeals Council either denies review or makes a decision is there a "final decision" of which judicial review is possible. 20 C.F.R. § 404.981.

A failure to exhaust administrative remedies by timely seeking Appeals Council review makes judicial review unavailable. *Lejeune v. Matthews*, 526 F.2d 950, 952 (5th Cir. 1976); *Goodreau v. Bowen*, 647 F. Supp. 1409, 1409 (W.D.Pa. 1986). *See also Wilson v. Secretary of Health & Human Servs*., 671 F.2d 673, 677 (1st Cir. 1982) (no jurisdiction in district court where administrative remedies not exhausted). An exception is made to the exhaustion requirement when the claimant challenges the commissioner's decision on constitutional grounds. *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *see Colon v. Secretary of Health & Human Servs*., 877 F.2d 148, 152 (1st Cir. 1989).

The plaintiff contends that he was depressed during the time period in which he was required to seek Appeals Council review, that this mental incapacity prevented him from filing a request for review, and that denial of his untimely request for review denied him due process of law, a constitutional claim. Plaintiff's Opposition to the Defendant's Motion to Dismiss the Complaint ("Plaintiff's Opposition") (Docket No. 11) at 1-2. He also relies on Social Security Ruling 91-5p ("SSR 91-5p"), "Titles II and XVI: Mental Incapacity and Good Cause for Missing the Deadline to Request Review," reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 at 809. That ruling provides, in pertinent part:

> When a claimant presents evidence that mental incapacity prevented him or her from timely requesting review of an adverse determination, decision [or] dismissal . . . and the clamant had no one legally responsible for prosecuting the claim (e.g., . . . [an] attorney, or other legal representative) at the time of the prior administrative action, SSA will determine whether

> or not good cause exists for extending the time to request review. . . .
>
> The claimant will have established mental incapacity for the purpose of establishing good cause when the evidence establishes that he or she lacked the mental capacity to understand the procedures for requesting review.
>
> In determining whether a claimant lacked the mental capacity to understand the procedures for requesting review, the adjudicator must consider the following factors as they existed at the time of the prior administrative action:
>
> — inability to read or write;
> — lack of facility with the English language;
> — limited education;
> — any mental or physical condition which limits the claimant's ability to do things for him/herself.

Id. at 810. The Appeals Council considered this Ruling in denying both the plaintiff's initial request and his request for reconsideration. Order of Appeals Council at 1; DePass Letter.

The plaintiff does not suggest any constitutional violation inherent in what he alleges to be the defendant's misapplication of its own Ruling. Even if such a violation had been alleged, the Appeals Council's conclusion that the only evidence submitted by the plaintiff concerning his mental capacity at the relevant time was insufficient to meet the requirements of SSR 91-5p does not rise to the level of a constitutional violation.[1] The only evidence submitted by the plaintiff on this point was the statement in his affidavit that "I was unable to cope with appealing this matter on my own due to my severe depression and lack of understanding of the process." Plaintiff's Aff. ¶ 2. This

[1] The evidence submitted by the plaintiff concerning his legal representation is also limited to his affidavit. Acknowledging that he was represented by a paralegal during the hearing before the administrative law judge, the plaintiff states that "after we received the unfavorable decision from the administrative law judge, [the paralegal] was not willing to represent me in an appeal to the appeals council." Plaintiff's Aff. ¶ 1. This statement suggests both that the plaintiff was not unrepresented "at the time of the prior administrative action," as required for relief under SSR 91-5p, and that he was made aware, upon receiving the administrative law judge's decision, that he needed to file "an appeal." This potential support for the Appeals Council's decision insofar as it applied SSR 91-5p is not mentioned by the Appeals Council and therefore will not be discussed further here.

conclusory statement, interpreted generously in favor of the plaintiff, at best addresses only the final factor listed in SSR 91-5p as evidence of mental capacity, in that it claims a limit on his mental capacity to do one specific thing. There is no medical evidence whatsoever in the record to support this statement. In general, the commissioner does not accept a claimant's unsupported assertions of disabling symptoms. 20 C.F.R. § 404.1529(a). The plaintiff suggests no reason why the Appeals Council was required to do so under the circumstances present in this case.

The plaintiff also relies on *Torres v. Secretary of Health & Human Servs.*, 475 F.2d 466 (1st Cir. 1973). In that case, the First Circuit merely held that the Secretary of Health and Human Services (now the Commissioner of Social Security) must consider, when the issue is raised by a claimant who has failed to comply with time limits established by Social Security regulations, whether the claimant's mental condition at the relevant time deprived him of "the awareness and mental capacity to understand and pursue one's right." *Id*. at 468. The Appeals Council did so in this case.

The plaintiff points out that he need only demonstrate a "colorable" due process violation in order to avoid dismissal. *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997). However, in each of the cases that he cites to support his claim, and in other case law reasonably on point that my research has located, the claimant, unlike the plaintiff here, had either asserted a claim of mental incapacity in his or her initial application for benefits, *e.g.*, *Elchediak v. Heckler*, 750 F.2d 892, 893 (11th Cir. 1985), or presented medical evidence of mental incapacity at the relevant time, usually accompanied by evidence of a long-standing mental condition, along with his or her request for relief from regulatory or statutory periods of limitation or for reconsideration, *e.g.*, *Canales v. Sullivan*, 936 F.2d 755, 757 (2d Cir. 1991); *Parker v. Califano*, 644 F.2d 1199, 1203 (6th Cir. 1981); *Bobola*

v. Sullivan, 753 F. Supp. 729, 731 (N.D.Ill. 1991). Even in cases where it is impossible to tell when the medical evidence entered the claimant's file, medical evidence supporting the claim of a mental condition preventing the claimant from taking the necessary action has been before the court. *E.g.*, *Kapp v. Schweiker*, 556 F. Supp. 16, 20-21 (N.D.Cal. 1981). Here, as previously noted, the plaintiff did not apply for benefits based on a mental condition, the only evidence of depression in the record concerns an episode that was fully resolved within a month three years before the period in which the plaintiff was required to seek Appeals Council review, and the only evidence before the Appeals Council or this court concerning the plaintiff's mental condition during the appeal period is his own affidavit, quoted above.

When entitlement to the constitutional-exception rule of *Sanders* is asserted by a claimant, an allegation that is "purely conclusory, unsupported by facts" is insufficient. *Davis v. Schweiker*, 665 F.2d 934, 936 (9th Cir. 1982). "A claim of constitutionally defective notice, even in the context of a claim for disability benefits based on mental illness, cannot invoke federal court jurisdiction merely upon a generalized allegation, long after the fact, that the claimant was too confused to understand available administrative remedies." *Stieberger v. Apfel*, 134 F.3d 37, 41 (2d Cir. 1997). A "particularized allegation of mental impairment plausibly of sufficient severity to impair comprehension" is required. *Id*. at 40-41. The plaintiff has made no such showing here. *See also Elchediak*, 750 F.2d at 895 (claimant raises colorable constitutional claim when he has shown, *inter alia*, a "medically-documented mental illness"); *Evans*, 110 F.3d at 1483-84 (finding considerably more medical evidence than that supplied by plaintiff here to be insufficient to establish that claimant was "so mentally impaired at the time of his first two application denials [of which he did not request reconsideration] that not reopening would constitute a denial of due process").

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of July, 1999.

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David M. Cohen
United States Magistrate Judge